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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Communications Assistance for) CC Docket No. 97-213
Law Enforcement Act)
)

**COMMENTS OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.**

PrimeCo Personal Communications, L.P. ("PrimeCo")¹ hereby submits the following brief comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-referenced proceeding.² As discussed herein, the industry's inability to comply with the as yet undetermined CALEA capability standards by the October 25, 1998 deadline outweigh certain issues posed in the *CALEA NPRM* in terms of significance to wireless carriers. PrimeCo urges the Commission to intervene to resolve the impasse between industry and law enforcement with respect to CALEA standards and the compliance extension date. PrimeCo also urges the Commission to revise certain proposed compliance and recordkeeping requirements under CALEA.

¹ PrimeCo is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc. and solely controlled by Bell Atlantic Corp.) and PCS Nucleus, L.P. (owned by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc.). PrimeCo is the broadband A/B Block PCS licensee or is the general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

² *Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking*, CC Docket No. 97-213, FCC 97-213 (released October 10, 1997), *Errata* (released October 24, 1997) ("*CALEA NPRM*").

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DISCUSSION

I. DEVELOPMENTS SINCE RELEASE OF THE *CALEA NPRM* WARRANT EXPEDITIOUS CONSIDERATION OF CTIA'S PETITION FOR RULEMAKING TO ESTABLISH AN ELECTRONIC SURVEILLANCE TECHNICAL STANDARD

The Commission in the *CALEA NPRM* declined to address the Petition for Rulemaking filed by the Cellular Telecommunications Industry Association ("CTIA Petition") which had requested that the Commission adopt technical capability standards for the wireless industry.³ While PrimeCo agrees that the issues on which the Commission seeks comment in the *CALEA NPRM* need to be addressed, the issues surrounding industry's ability to bring their facilities into compliance with the as yet undetermined capability standards by the October 25, 1998 deadline overshadow the issues posed in the *CALEA NPRM*. The Commission determined in the *CALEA NPRM*, however, that "[b]ased on the ongoing nature of the standard-setting process, . . . it would be inappropriate at this time for us to address technical capability standards issues."⁴

As the Commission is aware, in early November (after release of the *CALEA NPRM*) the American National Standards Institute ("ANSI") closed balloting on SP-3580A, industry's proposed CALEA capability standard. As was the case in June 1997, law enforcement organizations uniformly opposed the proposed standard, thus delaying implementation of a standard for at least an additional six months. Simply put,

³ Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking, Cellular Telecommunications Industry Ass'n, filed July 16, 1997.

⁴ *CALEA NPRM* ¶ 44.

the standard-setting process has come to a grinding halt, and the Commission must now take the proactive role Congress intended to resolve this impasse.

Congress clearly envisioned that the Commission should arbitrate if technical standards are not implemented in a timely manner. Section 107(b) of CALEA provides that:

If industry associations or standard-setting organizations fail to issue technical requirements or standards *or* if a Government agency or any other person believes that such requirements or standards are deficient, the agency or person may petition the Commission to establish, by rule, technical requirements or standards that [meet specified objectives].⁵

In effect, both conditions of Commission intervention are present in that industry associations and standard-setting organizations have failed to issue standards and government agencies — *i.e.* the FBI and other law enforcement agencies — believe that the proposed standards are deficient and have blocked approval. PrimeCo urges the Commission to intervene in this critical matter.

PrimeCo does *not* believe that the Commission should independently set a standard. Experience has demonstrated that established industry-setting bodies are capable of setting appropriate technical standards, and PrimeCo believes that the standards-setting process for CALEA is no exception. Law enforcement's congressionally-mandated role in the process, however, distinguishes CALEA from prior standards-setting efforts. In this regard, the Commission can be helpful, not by setting a separate standard but by arbitrating the current impasse between industry and law enforcement. More specifically, industry has approved the standard, now numbered J-

⁵ Communications Assistance for Law Enforcement Act, Pub. L. 103-414 § 107(b) (codified at 47 U.S.C. § 1006(b)) (emphasis added).

STD-025, on an interim basis. PrimeCo submits that the Commission should intervene to finalize the interim standard as CALEA-compliant, and to allow the other capability issues on which the FBI and industry disagree to be addressed separately. This will allow carriers and manufacturers to move forward on those issues of agreement with law enforcement and to more expeditiously implement CALEA capability and capacity requirements.

II. THE COMMISSION SHOULD CONSIDER THE STANDARDS STALEMATE AS A FACTOR FOR CONSIDERATION OF REQUESTS UNDER THE “REASONABLY ACHIEVABLE” STANDARD

In considering carriers’ petitions seeking Commission determination of whether bringing their equipment, facilities, or services deployed after January 1, 1995 into compliance with CALEA’s capability requirements is “reasonably achievable,” the Commission is expressly authorized to consider, in addition to the factors enumerated in the statute, “such other factors as the Commission determines are appropriate.”⁶ PrimeCo submits that the delays resulting from the technical standards impasse constitute a factor appropriate for consideration with respect to compliance requirements. Due to buildout requirements and customers’ service needs, wireless licensees — and broadband PCS licensees in particular — must continue to deploy their systems using non-CALEA compliant equipment. The longer the delays, the more costly, in turn, it will be for carriers to bring their facilities into compliance. The inability to reach consensus on a technical standard should not penalize wireless carriers who are deploying competitive

⁶ *Id.* § 109(b)(2) (codified at 47 U.S.C. § 1008(b)(1)(K)).

systems in accordance with the Commission's rules, and who stand willing to implement CALEA-compliant equipment once it is commercially available.

III. THE COMMISSION SHOULD ENTERTAIN BLANKET REQUESTS FOR EXTENSION OF THE OCTOBER 25, 1998 COMPLIANCE DEADLINE

Telecommunications carriers could be assessed fines of \$10,000 per day for non-compliance with CALEA's capability requirements.⁷ As discussed above, however, industry and law enforcement authorities are far from agreement on implementing an industry standard. Furthermore, it is clear that wireless providers will be unable to comply with the initial October 1998 date.⁸ In light of the potential fines and the certainty that CALEA-compliant equipment will not be available from vendors and implemented by carriers until after the October deadline, the Commission can expect numerous CALEA extension requests from wireless service providers.

Congress clearly expected the Commission to intervene in this circumstance as well. Section 107(c) of CALEA provides:

The Commission may, after consultation with the Attorney General, grant an extension [of the October 1, 1998 deadline] if the Commission determines that compliance with the assistance capability requirements

⁷ *Id.* § 201(a) (codified at 18 U.S.C. § 2522(c)(1)).

⁸ In recent congressional testimony, for example, industry associations representing service providers and manufacturers agreed that manufacturers will require at least two years to bring CALEA-compliant products to market once the standard is finalized. *See* Testimony of Jay Kitchen, Pres., Personal Communications Industry Ass'n before the House Judiciary Committee, Subcommittee on Crime, Oct. 23, 1997; Testimony of Matthew J. Flanigan, Pres., Telecommunications Industry Ass'n before the House Judiciary Committee, Subcommittee on Crime, Oct. 23, 1997; Testimony of Thomas E. Wheeler, Pres., Cellular Telecommunications Industry Ass'n before the House Judiciary Committee, Subcommittee on Crime, Oct. 23, 1997.

under section 103 is not reasonably achievable through application of technology available within the compliance period.⁹

For reasons of fundamental fairness and administrative necessity, the Commission should adopt a blanket extension of the compliance deadline. CTIA's suggestion of two years from the date a standard is established is a sensible initial approach consistent with CALEA and which accounts for the realities of (1) product development for manufacturers and (2) system deployment for carriers.¹⁰ At a minimum, the Commission should clarify that it will entertain requests from industry associations, such as CTIA and PCIA, or filings jointly submitted by several carriers, to avoid the need for separate filings from all affected wireless carriers.

IV. THE COMMISSION'S PROPOSED COMPLIANCE RULES FOR CARRIERS' INTERNAL PROCEDURES AND RECORDKEEPING ARE UNDULY BURDENSOME

Telecommunications carriers have considerable incentive to comply with CALEA's privacy protections and law enforcement capability requirements. Carriers must provide privacy protection to attract and retain customers. Furthermore, carriers are subject to criminal prosecution, civil damages, Commission forfeiture, and court-imposed fines for violations of CALEA. In addition, there is a long history of cooperation between carriers and law enforcement under the 1968 Wiretap Act. For these reasons, there is nothing to suggest that more stringent requirements are necessary under CALEA.

⁹ CALEA § 107(c).

¹⁰ CTIA Petition; CALEA § 107(c)(3)(B) (authorizing Commission to extend deadline up to two years after the date on which the extension is granted).

It is unnecessary to require an employee to prepare and execute an affidavit each time an interception is performed. An annual "blanket" affidavit should be sufficient; at a minimum, employees should be given flexibility to execute the affidavit *after* carrying out the intercept. Also, the affidavit itself — as well as the proposed recordkeeping requirements — unnecessarily require information already generally available in the court order, including the date and time the interception begins and ends, the identity of the law enforcement officer, name of the judge, and the type of interception. Moreover, the proposed 10 year record retention requirement bears no correlation to relevant law enforcement needs, as the statute of limitations for civil suits against carriers and their employees is only two years.

Finally, the Commission's proposed demarcation point for requiring only carrier self-certification of internal policies — \$100 million — makes little sense for CMRS carriers which operate in a competitive marketplace. Indeed, while acknowledging the statutory requirement of Commission review, PrimeCo questions the utility of *detailed* Section 229(b)(3) reporting requirements for *any* carrier. Whether a carrier affords its customers privacy protections and assists law enforcement in accordance with CALEA will be determined on a going-forward basis. In light of carriers' longstanding record of cooperation with law enforcement and the severe penalties for noncompliance, the Commission's proposed self-certification procedures should be sufficient for all carriers.

CONCLUSION

For the reasons discussed herein, the Commission should: (1) intervene and work with industry and law enforcement to adopt technical capability standards consistent with CALEA; (2) consider the delays in adopting technical standards when reviewing Section 109 requests; (3) extend the compliance deadline; and (4) minimize and revise the proposed compliance and recordkeeping burdens imposed on carriers.

Respectfully submitted,

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December 12, 1997